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No. 93-(1)

Supreme Court, U.S.
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In the
SUPREME COURT of the UNITED STATES
October Term, 1993

ROBERT F. FULLER and RIPLEY R. CLICK,
Petitioners,

v.

FMC CORP. TERMINATED VESTED AND RETIRED SALARIED EMPLOYEES' RETIREMENT PLAN, FMC CORP. SEVERANCE PAY PLAN, FMC CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES PRESENTED

1. Whether it was error for the Court of Appeals to reverse summary judgment awarding the plaintiffs severance pay and render summary judgment in favor of FMC Corporation without considering FMC's severance pay obligation on the closing of an FMC business "location"?

2. Whether the Court of Appeals incorrectly held an FMC-drafted summary booklet's description of an unfavorable benefit applying "If you leave FMC" to "unambiguously" cover the situation in which the employee takes no action to "leave FMC" but FMC instead leaves the employee behind by closing a business location?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert Fuller and Ripley Click petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit entered on July 28, 1993.

OPINIONS BELOW

The July 28, 1993 decision of the United States Court of Appeals for the Fourth Circuit in No. 92-1738, as amended by order filed September 22, 1993, is reported at 4 F.3d 255. App. 1a-19a. The May 26, 1992 decision of the United States District Court for the Western District of Virginia in Civil Action No. 90-0145-H is reported at 796 F. Supp. 909. App. 20a-57a.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. Section 1291. Petitioners filed a timely petition for rehearing following the Fourth Circuit's decision. That

petition was denied on September 21, 1993, except the Fourth Circuit amended its decision to delete four sentences in the text and one citation to a purported Fourth Circuit ERISA opinion the plaintiffs discovered did not exist. App. 18a-19a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001 et seq.. The primary statutory and regulatory sections involved are 29 U.S.C. Section 1022 and 29 C.F.R. 2520.102-2(a) and (b) and -3(l). The relevant text of these provisions is reproduced in the Appendix. App. 58a-60a.

STATEMENT OF THE CASE

I. FMC'S DENIAL OF THE PETITIONERS' SEVERANCE AND RETIREMENT BENEFITS

This case involves two long-service former FMC Corporation employees who have been denied substantial severance payments and early retirement benefits they are ill-equipped to do without. Both former employees devoted the larger part of their working lives to the FMC Corporation. In September 1985, FMC decided to close the Woodstock, Virginia location at which they worked because of the location's unprofitability. FMC sold the physical assets to a former plant manager who began operating under the name of Agri-Tech. Concurrently, FMC terminated the employment

of the persons who had worked for FMC in Woodstock, Virginia. Thereafter, Agri-Tech hired the former FMC employees with substantially reduced benefits, most notably, with no retirement benefits and no severance pay.

FMC had promised to pay the plaintiffs severance benefits and early retirement pensions under certain conditions that were described in FMC-drafted summary plan descriptions (SPDs). But after FMC terminated the plaintiffs' employment, FMC unveiled new exceptions to the severance and early retirement benefit promises. FMC's exceptions had not previously been disclosed to the plaintiffs. FMC sought to avoid the severance pay obligation by contending the benefit is not due if a different company hires the terminated employee, even though FMC has indisputably closed its operations at that "location." FMC sought to avoid paying early retirement benefits by claiming that under an eleventh-level dictionary definition, the plaintiffs were the ones to "leave FMC," instead of the other way around.

II. THE PROCEEDINGS BELOW

The United States District Court for the Western District of Virginia ruled on cross motions for summary judgment that plaintiffs were entitled to the severance pay and the early retirement benefits. In the District Court's view, ERISA requires understandable disclosure of exceptions like those FMC seeks to impose. App. 32a and 40a and 46a-54a. Without disclosure of those exceptions during the time when the plaintiffs were offering their labor, FMC was obligated to pay the benefits.

On appeal pursuant to 28 U.S.C. Section 1291, the United States Court of Appeals for the Fourth Circuit reversed and rendered summary judgment for the opposing party.

According to the Court of Appeals, although FMC terminated the plaintiffs' employment, severance pay was not due because the plant at which the plaintiffs worked was not "close[d]." The Court of Appeals did not address whether the FMC Woodstock, Virginia "location" was "closed." In regard to the early retirement benefits, the Court of Appeals did not address the plaintiffs' reasonable understanding of the conditions for early retirement benefit but ruled that an undefined reference to "retire" "presuppose[d]" "unambiguously" that the plaintiffs had to be employed by FMC at the time when they applied for benefits.

REASONS FOR GRANTING THE WRIT

In haste to reverse summary judgment in favor of the plaintiffs and render judgment in favor of FMC Corporation, the Fourth Circuit discarded important ERISA protections and departed from the usual and accepted standards of judicial review of motions for summary judgment. The Fourth Circuit's decision warrants the exercise of this Court's power of supervision. Specifically, the Fourth Circuit's decision has: (1) ignored a crucial part of FMC's severance obligation, and (2) failed to apply well-established decisions on ERISA summary plan descriptions ("SPDs") and on whether language is "unambiguous."

By doing this, the Fourth Circuit has eliminated ERISA's statutory protections for individuals who depend on employee benefit plans for retirement benefits and severance pay. ERISA's disclosure rules were enacted to require companies like FMC to understandably disclose "exactly ... what circumstances may preclude [them] from obtaining [anticipated] benefits." H.R. Rep. 93-533, 11, II ERISA Legislative History 2358; S. Rep. 93-127, 27, I ERISA Leg. Hist. 613. In Hansen v. Continental Insurance Co., 940 F.2d

971 (5th Cir. 1991), the Fifth Circuit held:

> Any burden of uncertainty created by careless or inaccurate drafting of the summary [SPD] must be placed on those who do the drafting ... and not on the individual employee, who is ... ill equipped to bear the financial hardship that might result from a misleading or confusing document.

See also Heidgerd v. Olin Corp., 906 F.2d 903, 907 (2d Cir. 1990); Edwards v. State Farm Mut. Aut. Ins. Co., 851 F.2d 134, 136-37 (6th Cir. 1988). But in Fuller v. FMC Corp. Retirement Plan, the Fourth Circuit has announced it will allow a Fortune 500 company to escape from pension and severance benefit obligations by imposing new exceptions the company chose not to understandably describe to its employees while they were working (and in possession of the ability to carry their labor elsewhere).

I. THE FOURTH CIRCUIT HAS NOT APPLIED THE LEGAL STANDARD FOR REVERSING SUMMARY JUDGMENT AND RENDERING SUMMARY JUDGMENT IN THE OPPOSING PARTY'S FAVOR

When a District Court grants summary judgment in one party's favor, the Court of Appeals may reverse but it may not render summary judgment in the other party's favor unless it rejects each ground on which the first party sought relief and finds that no genuine factual disputes exist to prevent rendering summary judgment for the other party when the evidence is viewed in the most favorable light to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In rendering summary judgment for the FMC defendants, the Fourth Circuit's opinion failed to apply this standard. Instead, it overlooked a clearly-presented second ground on which the plaintiffs were due severance pay and it failed to apply well-established decisions on when an SPD's description of benefits is "unambiguous." The Court's rendering of judgment in the FMC defendants' favor is defective because of this.

II. WHEN FMC CLOSED ITS OPERATIONS AT THE WOODSTOCK, VIRGINIA LOCATION, THE PLAINTIFFS WERE DUE SEVERANCE PAY

FMC maintained a severance pay plan for employees in its citrus machinery division. This plan offered "one weeks pay for each full year of service up to a maximum of twelve (12) weeks [severance] pay" if the employees were ever "terminated due to the closing of a[n FMC] plant or location." Joint Appendix ("J.A.") 519.[1] The District Court concluded the plaintiffs were terminated due to the closing of the FMC "plant or location" and did not need to distinguish between the "plant or location" closing language. App. 28a-41a (emph. added).

The Fourth Circuit's opinion reversed the District Court on the theory that the plant was not closed, but the Fourth Circuit did not address the "location" closing language: It stated only that "[w]e conclude that because the plant was

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[1] The Joint Appendix refers to the Joint Appendix filed with the United States Court of Appeals for the Fourth Circuit. To contain the size of the appendix accompanying this Petition, these pages have not been included in that appendix.

not closed" "they were not terminated as that term is defined by the [severance] plan." App. 8a. To grant summary judgment in FMC's favor, the opinion needed to conclude that "because the plant or location was not closed..."

Plaintiffs argued to the Court of Appeals (and the District Court) that severance pay was due on either the closing of the "plant or location." Plaintiffs contended that assuming arguendo the FMC "plant" was not closed because an unrelated purchaser reopened it, the FMC Woodstock, Virginia "location" was certainly closed after FMC discontinued its operations and sold the physical assets. Appellees' Court of Appeals ("C.A.") Br. at 13-14. Plaintiffs stressed the closing of a FMC "location" does not contemplate that a location physically ceases to exist on the map. It contemplates that FMC no longer carries on business operations there. Id. Indeed, FMC itself defines the severance policy's scope as covering "All domestic [FMC] Machinery group locations where shop and/or office employees are not represented by a labor organization." J.A. 517. It is indisputable that the FMC location in Woodstock, Virginia is now closed.

The Fourth Circuit should accordingly have affirmed the District Court's judgment for the plaintiffs on the second ground that FMC terminated their employment when it closed its Machinery group "location" in Woodstock, Virginia. In the alternative, the case should be remanded to the Fourth Circuit to determine whether FMC has closed its Woodstock, Virginia "location."

III. EARLY RETIREMENT BENEFITS ARE DUE BASED ON THE SPD'S DESCRIPTION OF BENEFITS SINCE THE PLAINTIFFS DID NOT TAKE ACTION TO LEAVE FMC

The District Court awarded the plaintiffs early retirement benefits with a favorable 4% reduction factor for each year before age 62 in which they were retired. The District Court's award was based on the description of the benefit rules in the ERISA-prescribed summary plan description ("SPD"). App. 46a-54a. Without attention to that description, FMC had been paying the plaintiffs under a much steeper 6% per year reduction for each year that they retired before age 65. The difference the steeper 6% per year reduction makes is 44% lower benefits: $167 per month for Robert Fuller, instead of $300 under the District Court's award; $292 per month for Ripley Click instead of $510.

ERISA requires companies sponsoring employee benefit plans to draft and distribute summary plan descriptions (SPDs) that accurately and understandably describe the conditions under which the employees will lose or be disqualified from anticipated benefits. 29 U.S.C. Section 1022; 29 C.F.R. 2520.102-2(a) and (b) and -3(l). The FMC-drafted SPD describing the company's retirement benefits told the plaintiffs and other employees the steeper 6% reduction would only apply "If you leave FMC." App. 62a-63a.

In ordinary English: "If you leave FMC" told employees the steeper 6% reduction in early retirement benefits would apply if you "go away from, desert, abandon, or terminate your association" with FMC. Webster's Ninth New Collegiate Dictionary. The pronoun "you" combined with the active verb "leave" shows the employee is the actor,

the performer, the person in charge--not a person acted upon by events beyond their control.

Fuller and Click testified they were unconcerned with the steeper 6% reduction because they had no intention to "leave FMC" until their working careers were over. J.A. 650-51 and 698-99; see also J.A. 191-92, 218-20; Appellees' C.A. Br. at 25-26. The plaintiffs testified they read the SPD to mean they would not be disqualified from the more favorable 4% early retirement benefit unless they were to leave FMC. Id.

On this basis, the District Court found the reasonable understanding of the SPD's description was that the more favorable 4% reduction factor applied since the plaintiffs did not "take action to leave the company." Instead, FMC had left its Woodstock, Virginia location and them behind. App. 50a-52a.

On appeal, the Fourth Circuit recognized the District Court had ruled the SPD's reference to "If you leave FMC" was confusing. The Fourth Circuit also accepted that the language is not "crystal clear." But the opinion nevertheless managed to conclude the language is "neither confusing nor ambiguous." App. 11a-12a.

To accomplish this, the Fourth Circuit looked away from that language and turned its attention to the SPD's description of the more favorable 4% early retirement factor. The Court concluded the description of the 4% early retirement benefit as available to individuals who "retire" after they "attain" age 55 "unambiguous[ly]" requires the individuals to be in an "employer-employee" relationship with the company at the time they attain age 55. App. 11a.

"Unambiguous" means not "susceptible to two reasonable interpretations." See, e.g., Bear Brand Hosiery Co. v. Tights, Inc., 605 F.2d 723, 726 (4th Cir. 1979) ("if there is more than one inference ... to be drawn from the language employed," it is ambiguous). As a matter of law, it was error for the Fourth Circuit to conclude the FMC SPD's description of the more favorable 4% early retirement factor unambiguously requires individuals to be in an employer-employee relationship with FMC at the same time when they attain age 55. The Fourth Circuit opinion states the word "retire" "by definition presupposes an employer-employee relationship." App. 11a (emph. added).[2]

Because a second inference can be drawn, it was error for the Fourth Circuit to hold the word "retire" unambiguously "presupposes" this meaning. The plaintiffs demonstrated that under FMC's retirement plan, "retire" does not require an employer-employee relationship at the time of the retirement, but simply an application by an eligible current or former employee to start drawing benefits. This was demonstrated in two ways. First, plaintiffs showed that FMC's SPD states that even those individuals who "leave FMC" earlier can subsequently "retire." App. 61a. Second,

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[2] The Fourth Circuit cited Awbrey v. Pennzoil Co., 961 F.2d 928, 932 (10th Cir. 1992), as support. But Awbrey does not describe the definition of retirement involved in that case. Without question, some plans, presumably including Pennzoil's, define "retire" as requiring employment with the sponsoring company at a certain age. But FMC's plan did not do this: To the contrary, FMC's SPD said that any individual who leaves FMC with 10 years of service can "retire" later. App. 61a. Thus, FMC affirmatively recognized that former employees can "retire" after the time when the employer-employee relationship ends.

plaintiffs introduced letters from FMC written in 1986 and 1989 specifically telling them that they could elect to "retire" subsequent to the time when the employer-employee relationship had ended simply by filing an application. J.A. 662-66 and 710-13 ("[y]ou may ... elect to retire on the first day of any month after you reach age 55"; if you elect to retire at age 55 ..."); see also Appellees' C.A. Br. at 5 and 29.[3]

A restriction as important as a condition that the employee may not "retire" subsequent to the time the employer-employee relationship with FMC ends cannot, and should not, be "presuppose[d]" by a court of appeals without any expression in the SPD and then be held to be "unambiguous." This is especially so when the SPD and letters from the clearly express the opposite intent. In addition, an important restriction on a word like "retire" may not be "presupposed" by a court of appeals when ERISA's protections mandate clear and understandable disclosure to the average employee of any such a restriction. 29 C.F.R. 2520.102-2(a) and (b) and -3(l).

It is only by closing its eyes to the ambiguity, ERISA's disclosure rules, and the evidence that the Fourth Circuit was able to ignore two other critical pieces of evidence presented by the plaintiffs. First, the plaintiffs introduced evidence, obtained in discovery from FMC, that FMC has in fact granted the more favorable 4% early retirement benefits to two groups of former employees who ceased their employment with FMC before turning age 55 and went to work for other

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[3] Plaintiffs further showed FMC has paid the more favorable early retirement benefits to other, similarly situated former employees who "retire[d]" after the time when the employer-employee relationship has ended. J.A. 779.

companies. Appellees' C.A. Br. at 30 (setting out record citations). Second, the plaintiffs introduced typed individual statements from FMC expressly promising them the more favorable 4% early retirement benefit, as well. These statements specifically said: "Due to the plant shutdown, an early retirement reduction of 4% per year will be applicable." J.A. 494 and 525; Appellees' C.A. Br. at 23.

The Fifth Circuit's opinion in Hansen v. Continental Ins. Co., 940 F.2d 971, 982 (5th Cir. 1991), holds:

> Any burden of uncertainty created by careless or inaccurate drafting of the summary [SPD] must be placed on those who do the drafting ... and not on the individual employee, who is ... ill equipped to bear the financial hardship that might result from a misleading or confusing document.

Here, the Fourth Circuit's opinion has placed the burden of uncertainty and financial hardship on individual employees, rather than the company who engaged in the misleading drafting. FMC's SPD promised the more favorable 4% early retirement benefit unless the employees were the ones to "leave FMC." The Fourth Circuit places the burden of uncertainty created by that language back on the two individual plaintiffs who devoted their working careers to the company and who are ill-equipped to bear the financial hardship of losing their benefits.

It was lastly error for the Fourth Circuit to ignore the uncontested facts the plaintiffs introduced about their reliance on the SPD's description of benefits. The plaintiffs showed they relied on the SPDs for the description of their benefits, remained in FMC's employ for a substantial period, and took no action to provide for their retirement by securing alternate

or supplemental benefits. Appellees' C.A. Br. at 23; J.A. 650-51 and 698-99. The Fourth Circuit's opinion, however, wrote:

> When we apply the same principles [from Pierce v. Security Trust Life Ins. Co.] to the case before us, it becomes apparent neither Fuller nor Click could show that he relied on the SPD to his detriment. Rather, they both were separated from FMC by reasons beyond their control, leaving them only with the termination benefit provided by the plan.

App. 13a. Pierce v. Security Trust Life Ins., 979 F.2d 23 (4th Cir. 1992), stands for the proposition that reliance will not be "presumed without any proof or reasoning." 979 F.2d at 30. In finding it "apparent" that neither plaintiff "could show" reliance, the Fourth Circuit ignored the plaintiffs' clear and uncontroverted proof on how they relied on the SPD's description of early retirement benefits. This departs from the accepted standards of judicial review of motions for summary judgment.

CONCLUSION

For the above reasons, this Court should issue a writ of certiorari to hear this case and reverse the decision of the Fourth Circuit denying the severance pay and early retirement benefits of the petitioners. The petitioners labored most of their working careers for these benefits and are now financially unable to do without them. ERISA was enacted to protect precisely this kind of reasonable expectations.

Respectfully submitted,

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